UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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In re:	Chapter 11
347 Linden LLC,	Case No. 10-50413-jbr
Debtor-Appellant.	Civil Case No. 11-cv-1990(KAM)(VVP) Civil Case No. 11-cv-2201(KAM) Civil Case No. 11-cv-2202(KAM)

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DECLARATION OF DAVID CARLEBACH IN SUPPORT OF THE APPELLANT'S EMERGENCY APPLICATION FOR A STAY OF THE BANKRUPTCY COURT'S ORDERS GRANTING RELIEF FROM STAY AND DISMISSING THE CHAPTER 11 BANKRUPTCY CASE, AND A STAY OF THE FORECLOSURE SALE OF THE PROPERTY KNOWN AS 347 LINDEN STREET, BROOKLYN, NEW YORK 11237, BLOCK 3328, LOT 47, PENDING APPEAL, PURSUANT TO FED. R. BANKR. PRO. 8005, AND FOR TEMPORARY RESTRAINTS STAYING THE BANKRUPTCY COURT'S ORDERS AND FORECLOSURE SALE OF THE PROPERTY PENDING THE HEARING AND DETERMINATION OF THIS EMERGENCY APPLICATION

TO THE HONORABLE KIYO MATSUMOTO
UNITED STATES DISTRICT JUDGE:

DAVID CARLEBACH, pursuant to 28 U.S.C. § 1746, declares under penalty of perjury as follows:

I am an attorney duly admitted to practice law in the state of New York, and in this Court, and I am counsel to Appellant 347 Linden LLC, which was the debtor the Bankruptcy Court (the "Appellant" or "Debtor"), and I am submitting this declaration in support of the Appellant's Emergency Application for a Stay of the Bankruptcy Court's Orders Granting Relief from Stay (the "Lift Stay Order") and Dismissing the Chapter 11 Bankruptcy Case (the "Dismissal Order"), and a stay of the foreclosure sale of the property known as 347 Linden Street, Brooklyn, New York 11237, Block 3328, Lot 47 (the "Property"), Pending Appeal, Pursuant to Fed. R. Bankr. Pro. 8005, and for Temporary Restraints staying the Lift Stay Order, Dismissal Order, and the Foreclosure Sale of the Property, Pending the Hearing and Determination of this Emergency Application.

PRELIMINARY STATEMENT

1. As will be set forth below, the Appellant is entitled to a stay of the enforcement of the Lift Stay Order, the Dismissal Order (the Lift Stay Order and Dismissal Order to be referred to, collectively, as the "Bankruptcy Court's Orders"), and the foreclosure sale of the Property to avoid irreparable harm.

2. In that regard, as set forth below, the Appellant will succeed on the merits of its appeals of the Bankruptcy Court's Orders, since the Bankruptcy Court committed clear error when lifting the stay, and dismissing the case, based on what amounts to mere technicalities which had no relevance to the Appellant's ability to reorganize.

3. In addition, the Bankruptcy Court also erred in ruling that the Appellant had no possibility of reorganizing, based solely on the conflicting pleadings and representations of counsel before it. Given the offers of proof from all parties, the Bankruptcy Court was required to conduct an Evidentiary Hearing to determine the feasibility of the Appellant's proposed Chapter 11 Plan.

4. Thus, the Bankruptcy Court's lifting of the stay, and dismissal of the Chapter 11 Proceeding put form over substance, as, based on the record before it, the Bankruptcy Court had no reason to not allow the Appellant to proceed to confirmation.

5. Indeed, the record in the Chapter 11 Proceeding established that the Appellant, a single asset debtor, was cash flow positive, with the ability to make adequate protection payments to the secured creditor, Fannie Mae, which it had done throughout the bankruptcy proceeding.

6. Furthermore, and rather significantly, Binghamton Affiliates, LLC, an unsecured creditor with a claim in the amount of approximately at least $3,673,032.88 (which dwarfed Fannie Mae's claim of approximately $1.4 million) joined in the Appellant's efforts to reorganize, and in opposition to Fannie Mae's efforts to dismiss and/or lift the automatic stay, which would deprive all creditors from payment, and benefit Fannie Mae alone.

7. The Bankruptcy Court, rather than allow the Appellant to proceed to confirmation, or, in the very least, conduct an Evidentiary Hearing on the Appellant's ability to reorganize, lifted the automatic stay and dismissed the Chapter 11 Case. The Bankruptcy Court did so despite the fact that Fannie Mae, the lone creditor seeking such relief, was adequately protected.

8. As Fannie Mae was adequately protected, and, therefore, not prejudiced by the continuation of the automatic stay and the Chapter 11 Proceeding, there was no logical reason for the Bankruptcy Court not to allow the case to proceed to confirmation.

9. Indeed, in mid-April, after the entry of the Bankruptcy Court's Orders, the Appellant obtained a tenant for its lone vacant commercial space (a pivotal issue in the bankruptcy proceeding), as it said it would be able to do come springtime.

10. Thus, the Appellant demonstrated that it will succeed on the merits of its appeals of the Bankruptcy Court's Orders.

11. Furthermore, the Appellant also demonstrates that the other relevant factors also merit granting the stay and temporary restraints.

12. In that regard, Fannie Mae will not be harmed by a stay, since the Appellant is ready, willing, and able to make adequate protection payments to Fannie Mae during the pendency of a stay pending appeal.

13. Furthermore, Fannie Mae, admittedly, will only incur minimal expense due to the stay, since it has only noticed a foreclosure sale after the District Court's denial of its stay application. Indeed, Fannie Mae admitted to the District Court that the only cost it would incur as a result of a stay would be approximately $2,500 for renoticing the foreclosure sale.

14. On the other hand, the Appellant will be irreparably harmed in the absence of a stay, since a foreclosure sale will render the appeals moot, and the Appellant will not have an adequate remedy at law.

15. In addition, the public interest merits granting the stay, since, absent a stay, the Property will be sold via foreclosure, and all creditors, aside from Fannie Mae, will receive nothing.

16. Finally, the Bankruptcy Court further abused its discretion when it summarily denied the Appellant's stay application within four hours of the filing of the application, and without even conducting a hearing. Accordingly, the Court should grant the stay pending appeal, and temporary restraints, despite the Bankruptcy Court's denial of same.

17. Based on the foregoing, and as detailed extensively herein, the Court should grant the Debtor's emergency application in its entirety.

PRIOR APPLICATION FOR STAY TO BANKRUPTCY COURT

18. Pursuant to Federal Rule of Bankruptcy Procedure 8005, on July 15, 2011, the Appellant sought a stay of the Bankruptcy Court's Orders and foreclosure sale of the Property pending appeal from the Bankruptcy Court. As set forth below, the Court summarily denied Appellant's application without even conducting a hearing. See, ¶¶ 95-97, *infra*; Exhibits X-AA.

STATEMENT OF FACTS

I

Background Facts

19. On November 3, 2010 (the "Petition Date"), the Debtor filed a petition for reorganization under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Eastern District of New York.

20. At all times during the Chapter 11 Proceeding, the Debtor continued to possess its Property and manage its business as a debtor-in-possession, pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

21. No trustee or examiner had been appointed, nor had any official committees been appointed in the Chapter 11 Proceeding.

22. The Debtor's Chapter 11 Case was a single asset real estate case as that term is defined pursuant to 11 U.S.C. § 101(51)(B).

23. The Debtor's primary asset is the Property, which is a multiple use building with 14 residential units and 2 commercial units.

24. Fannie Mae holds a secured lien against the Property in the approximate amount of $1.4 million.

25. Prior to the Petition Date, Fannie Mae had commenced a foreclosure proceeding against the Property (the "State Court Foreclosure Proceeding").

26. Aside from Fannie Mae, there were five other creditors holding unsecured claims in the total amount of $4,250,965.58, with Creditor The Pratt Park Group ("Pratt Park") holding a $4,100,000 claim.

27. On December 8, 2010, the Bankruptcy Court entered its Second Interim Order Authorizing Debtor to use Cash Collateral of Federal National Mortgage Association and Providing Adequate Protection. Exhibit A. This order provided for the Debtor to make adequate protection payments to Fannie Mae for the months November 2010 through January 2011. See, Exhibit A, at 6-7.

28. On January 18, 2011, the Bankruptcy Court entered its Final Order Authorizing Debtor to Use Cash Collateral of Federal National Mortgage Association and Providing Adequate Protection. Exhibit B. This order provided for the Debtor to make adequate protection payments to Fannie Mae for February 2011. See, Exhibit B, at 5-6.

29. Meanwhile, since the commencement of the Chapter 11 Proceeding, the Debtor was collecting rental income from the Property, which enabled the Debtor to make the adequate protection payments to Fannie Mae. Significantly, the Property was generating a considerable cash flow, making the adequate protection payments possible, despite there being a vacant commercial space in the Property. The Debtor was actively attempting to rent this space during the winter months, and the possibility of rental would have significantly increased during the spring and summer months. Thus, as set forth below, had the Debtor been allowed to continue with its Chapter 11 Proceeding, and go forward with confirmation of its Plan, the Debtor would have full rental income by confirmation, thus ensuring a successful reorganization. Indeed, as set forth below, the

Debtor obtained a tenant in mid-April, and entered into a lease for the remaining vacant commercial space.

II

Fannie Mae's Motion to Dismiss, or, in The Alternative, to Lift the Automatic Stay

30. Meanwhile, on January 14, 2011, Fannie Mae filed its motion for entry of an order (A) Dismissing the Chapter 11 Case; or alternatively, (B) Modifying the Automatic Stay (the "Fannie Mae Motion"). Exhibit C (Fannie Mae Motion without exhibits).

31. The portion of the Fannie Mae Motion seeking dismissal was based, primarily, on two contentions: (1) that the Chapter 11 Case was a bad faith filing; and (2) that "the Debtor does not have sufficient cash flow to adequately protect Fannie Mae" and its interest in the Property.

32. The portion of the Fannie Mae Motion seeking a lifting of the automatic stay was based on the same contentions of bad faith, that the Debtor had no equity in the Property, and that the Property is not necessary for an effective reorganization.

33. To support its contention that the Chapter 11 Proceeding was a bad faith filing, Fannie Mae argued, in sum and substance, that the Debtor filed its petition as a litigation tactic against Fannie Mae to stall the State Court Foreclosure Proceeding, and that the Debtor had no intention, and no hope, of reorganizing.

34. Fannie Mae also asserted that dismissal of the case was in the best interests of the Debtor and its creditors, which, in sum and substance, also rested on the same assertions of bad faith.

35. As stated before, the portion of Fannie Mae's motion for a lifting of the automatic stay was based, in part, on these same contentions of bad faith.

36. Fannie Mae also argued that the Bankruptcy Court should lift the automatic stay since the Debtor could not adequately protect Fannie Mae, the Debtor had no equity in the Property, and the Property was not necessary for an effective reorganization.

37. Thus, in order to succeed against Fannie Mae's Motion, it was clear that the Debtor had to demonstrate to the Bankruptcy Court that: (1) it filed the Chapter 11 Petition for the purpose of reorganizing; (2) it had the ability to reorganize; (3) dismissal was not in the best interests of the Debtor and its creditors; (4) it had the ability to adequately protect Fannie Mae's interest in the Property; and (5) the Property was necessary for an effective reorganization.

III

The Debtor's Objection to Fannie Mae's Motion, Including its Chapter 11 Plan and Disclosure Statement

38. In response to Fannie Mae's Motion, on February 16, 2011, the Debtor filed an Objection (the "Objection") which addressed every contention in the Fannie Mae Motion, and left no doubt that the Bankruptcy Court should have dismissed Fannie Mae's Motion in its entirety. Exhibit D (Objection without Exhibits).

39. Also on February 16, 2011, to prove that the Chapter 11 Petition was not filed in bad faith, the Debtor filed its Chapter 11 Reorganization Plan and Disclosure Statement[1]. See, Chapter 11 Disclosure Statement and Plan[2], Exhibit E. Therein, the Debtor set forth, in detail, how it would reorganize.

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[1]The Plan was an Exhibit to the Objection as well.

[2]The Plan is Exhibit A to the Disclosure Statement.

40. Thus, it was clear that the Chapter 11 Case was not filed in bad faith as the Debtor intended to, and indeed, had the ability to, reorganize.

41. The Objection also set forth how Fannie Mae was, indeed, adequately protected. In that regard, during the pendency of the Fannie Mae Motion, the Debtor made all the adequate protection payments to Fannie Mae under the adequate protection orders.

42. Specifically, and as set forth in the Objection, on January 18, 2011, the Debtor delivered to Fannie Mae $28,259.46, which were the adequate protection payments for November 2010 through January 2011. Subsequently, on February 15, 2011, the Debtor delivered to Fannie Mae $7,495.53 for the February 2011 adequate protection payment.

43. Thus, the Debtor was current on its adequate protection payments to Fannie Mae.

44. The Debtor also demonstrated that the Property was, indeed, necessary for an effective reorganization, since, as set forth in the Chapter 11 Plan, the Debtor would reorganize using the income generated from the Property.

IV

Creditor Binghamton Affiliates, LLC, holding a Claim of Approximately $3.7 Million, Joins in the Debtor's Objection to Fannie Mae's Motion, and Supports the Debtor's Reorganization

45. In addition, creditor Binghamton Affiliates, LLC ("Binghamton"), who filed a proof of claim in the amount of at least $3,673,032.88[3], (Exhibit F) - dwarfing Fannie Mae's claim of

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[3]This claim is the same as the aforementioned claim of Pratt Park (¶ 26, *supra*). As set forth by Binghamton in its Objection, Binghamton holds the unsecured claim on account of a Collateral Mortgage and Security Agreement, dated May 7, 2008, entered into between Morgan 86, Inc. ("Morgan"), as mortgagee, and the Debtor and Rogers Realty & Management Corp., as mortgagors. Binghamton, whose beneficial members are part of the group that provided the

approximately $1.4 million - joined in the Debtor's Objection, and specifically supported the Debtor's reorganization. Exhibit G . Thus, it was clear that dismissal was not in the best interests of the Debtor and its creditors.

46. Meanwhile, Fannie Mae's Motion was adjourned on consent to March 8, 2011, for the purpose of Fannie Mae conducting a Rule 2004 Examination of the Debtor concerning the Plan of Reorganization.

V

Fannie Mae's Reply to the Debtor's Objection

47. On March 4, 2011, Fannie Mae filed its Reply to the Debtor's Objection. Exhibit H.

48. Significantly, Fannie Mae withdrew the portion of its Motion seeking dismissal of the case. Thus, the only issue before the Bankruptcy Court was whether it should lift the automatic stay to allow for the continuation of the State Court Foreclosure Proceeding, which, in sum and substance, meant the foreclosure sale of the Property.

49. Fannie Mae also contended that the Debtor's Disclosure Statement and Chapter 11 Plan were deficient. Fannie Mae based its claims that the Debtor was unable to reorganize, in part, on the assertion that the Debtor could not substantiate the facts, figures, and projections in the Chapter 11 Plan. Fannie Mae's contentions in this regard rested primarily on the following four factors:

(1) the Debtor had not provided tax returns to the Office of the United States Trustee;

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original funds for the Mortgage and other related loans, has now directly acquired Morgan's interest and rights against various parties, including the Debtor. See, Exhibit G, ¶¶ 1-2.

(2) the Debtor had not provided the Office of the United States Trustee with a list of payments made within the 90 day prior to the Petition Date, nor had the Debtor amended its schedules to reflect such information;

(3) that the Debtor's principal, Mr. Hoffman, testified at the 341 Meeting of creditors that he had used rents from the Property for his own personal use to make a payment on his car, but had not disclosed that he received such payments from the Debtor; and

(4) Fannie Mae contended that the Debtor had not adequately substantiated the $140,000 cash infusion it would be receiving as provided in its Chapter 11 Plan, See, Exhibit H, at 4-5.

50. Fannie Mae, also in support of lifting the stay, further contended that the Debtor had not substantiated its projected increase in rental income, and that the Debtor had no equity in the Property. Id. at 4.

51. Notably, of the above factors, only the question of the $140,000 cash infusion and the projected increase in rental income were relevant to whether the Debtor had the ability to reorganize. The other information bore solely on disclosures the Debtor did not yet make to the Office of the U.S. Trustee, and had no bearing on the Debtor's ability to reorganize.

VI

The Debtor's Amended Plan and Amended Disclosure Statement, Which Substantiated the Figures and Projections Contained in the Plan and Disclosure Statement, and Evidenced the Debtor's Ability to Reorganize

52. In response to Fannie Mae's contentions contained in its Reply, the Debtor, on March 7, 2011, filed its Amended Chapter 11 Plan and Amended Disclosure Statement. Exhibit I.

53. Therein, the Debtor substantiated that the Chapter 11 Plan was confirmable by the following:

a. The Debtor set forth in its Amended Plan and Amended Disclosure Statement that Fannie Mae will receive, specifically, monthly payments of $5,281, plus required reserve and escrow payments. The Amended Plan and Amended Disclosure Statement stated that this monthly payment was based on a principle balance of $900,000, and represents the mortgage rate of interest of 5.80% with a 30-year amortization schedule, with a Mortgage Note maturity date of 2015. See, Exhibit I, Amended Disclosure Statement, at 11; Amended Plan, at 6.

b. The Debtor attached, as Exhibit G to its Amended Disclosure Statement, a commitment letter from Talmu, Inc. setting forth a commitment from Talmu, Inc. to loan the $140,000 to Mr. Hoffman for the purposes of the Chapter 11 reorganization. See, Id., Exhibit G thereto.

54. The above substantiated the ability of the Debtor to confirm its proposed Amended Chapter 11 Plan.

55. Accordingly, there was no reason for the Bankruptcy Court to either dismiss the case or lift the automatic stay.

VII

The March 8, 2011 Hearing

56. On March 8, 2011, the Bankruptcy Court held a hearing on Fannie Mae's Motion (the "March 8, 2011 Hearing"), which was, at the time, solely a motion seeking a lifting of the stay on the Property. See, Exhibit J, Transcript of May 8, 2001 Hearing.

57. At the March 8, 2011 Hearing, Fannie Mae's counsel, in support of what was then solely a lift stay motion, set forth all the above deficiencies it raised in its Reply. Fannie Mae's counsel also questioned the value of the commitment letter issued by Talmu Inc. Id. at 18-28.

58. In response, the Debtor's counsel verified that it had seen the statement of the bank account from which the $140,000 from Talmu, Inc. would be supplied and there were enough funds to make the loan. Id. at 32.

59. The Debtor's counsel also substantiated the Debtor's ability to make the monthly payments to Fannie Mae under the Amended Plan. Specifically, the Debtor's counsel set forth that, using the same maturity dates, same interest rates, and same amortization schedule to Fannie Mae based on the $900,000 principle amount - which was the agreed upon principal amount owed to Fannie Mae - that the Debtor, in addition to making the monthly payments to Fannie Mae, would also be able to add a deferred maintenance reserve, a roll-over apartment reserve, and even a vacant apartment reserve. Thus, under the figures of the Amended Plan, there would be more than enough money to meet the Property's expenses, even after the monthly payments to Fannie Mae. See, Id. at 33-34.

60. Furthermore, the Debtor's counsel explained that the Debtor's chances of obtaining a tenant for the one vacant commercial space in the Property would improve significantly come springtime. Thus, it would be very likely, if the Chapter 11 Proceeding would proceed, that the Property would be fully rented up, having the Property reach its maximum potential income - as set forth in the projections contained in the Amended Chapter 11 Plan - by the time the Debtor confirmed the Plan. Id. at 38-40.

61. In addition, the Debtor's counsel also explained that the lifting of the automatic stay would benefit only Fannie Mae, who would, in any event be paid in full as a secured creditor, but allowing for the case to proceed and the Debtor to reorganize would benefit all creditors, including Binghamton. Id. at 33.

62. The Debtor's counsel also stated that all the information which was required to be provided to the U.S. Trustee would be provided. Id. at 38.

63. Significantly, Binghamton's counsel also appeared at the March 8, 2011 Hearing in opposition to Fannie Mae's Motion and in support of the Debtor's reorganization. Binghamton's counsel pointed out that Binghamton would be the party really hurt by the dismissal of the case and that Binghamton was willing to sit down and negotiate with the Debtor in furtherance of the Debtor confirming a plan of reorganization. Id. at 44.

64. Thus, at the March 8, 2011 Hearing, the Debtor had clearly met its burden to show that it had a reasonable possibility of reorganizing.

VIII

The Bankruptcy Court Enters the Lift Stay Order and the Dismissal Order

65. At the conclusion of the March 8, 2011 Hearing, the Bankruptcy Court entered the following rulings.

66. The Bankruptcy Court granted the portion of Fannie Mae's Motion requesting relief from the automatic stay.

67. The Bankruptcy Court based its ruling on the fact that it believed that there was "cause," that there clearly was no equity in the Property, and that the Bankruptcy Court did not think that an effective reorganization was possible. Id. at 49.

68. The Bankruptcy Court then stated that it would enter an order dismissing the case. The Court stated that it was doing so based on "more than adequate cause," and summarized its reasons as follows: (1) the Debtor's failure to provide tax returns; (2) the Debtor not providing the 90 day list of payments; (3) the Court doubted the "existence" of the $140,000; (4) the Court viewed the Debtor as "one rental away" from "failure and disaster"; and (5) that the Debtor could not sustain the economics of the building and make payments to Fannie Mae. Id. at 50.

69. Based on the above, and despite there being a Chapter 11 Plan and Disclosure Statement on file, the Bankruptcy Court ruled that it would not allow the Debtor even the chance to confirm its Plan at a confirmation hearing.

70. On March 8, 2011, the Bankruptcy Court entered the Lift Stay Order. Exhibit K.

71. On March 8, 2011, the Bankruptcy Court entered the Dismissal Order. Exhibit L.

IX

The Debtor Files its Notices of Appeal of the Bankruptcy Court's Orders

72. On March 22, 2011, the Debtor timely filed its Notice of Appeal of the Lift Stay Order. Exhibit M.

73. On March 22, 2011, the Debtor timely filed its Notice of Appeal of the Dismissal Order. Exhibit N.

X

Fannie Mae Schedules a Foreclosure Sale of the Property for April 28, 2011

74. On or around April 8, 2011, Fannie Mae filed in the State Court Foreclosure Proceeding a Notice of Sale of the Property, scheduling the sale of the Property for April 28, 2011, at 3:00 p.m. Exhibit O.

XI

In the Interim, as it Represented it Would be Able to do to the Bankruptcy Court, the Debtor Obtained a Tenant for the Vacant Commercial Space, Who Pays Rent of $1,350 Per Month

75. In mid-April, shortly after the dismissal of the Bankruptcy Proceeding, and during the pendency of the appeals, the Debtor entered into a lease with a tenant for the vacant commercial space. See, Exhibit P, Lease Between the Debtor and Raphael Barrientos Barber Shop.

76. The tenant barber shop will be paying a monthly rent of $1,350. The Debtor received one month's security, along with the first month's rent. The Debtor used the first month's rent to pay the broker. See, Exhibit Q, Declaration of Abraham Hoffman, ¶4.

77. As part of the lease, the Debtor gave a one month concession of rent to the tenant. Thus, the barber shop did not pay rent in June. The monthly rental payments resumed July 1, 2011. Id. at ¶5.

78. The tenant moved into the premises on May 1. Id. at ¶6.

79. Thus, as represented to the Bankruptcy Court, upon springtime, the Debtor was able to obtain a tenant for the commercial space.

80. This further evidences that the Bankruptcy Court erred in determining, without an Evidentiary Hearing, that the Debtor did not have the ability to reorganize, and that the Bankruptcy Court erred in not allowing the Debtor to proceed with confirmation.

XII

The Debtor is Ready, Willing, and Able to Make Adequate Protection Payments to Fannie Mae During the Pendency of a Stay Pending Appeal

81. Finally, to show that Fannie Mae will not be harmed in the event the Bankruptcy Court's Orders and foreclosure sale of the Property are stayed pending appeal, the Debtor is ready, willing and able to make adequate protection payments to Fannie Mae pending a stay pending appeal.

XIII

The Debtor's First Emergency Application to the District Court to Stay the Foreclosure Sale and Court's Orders Pending Appeal

82. On April 22, 2011, the Debtor filed an emergency motion to stay the foreclosure sale, pending appeal, with this Court. See, Exhibit R, Emergency Order to Show Cause and Application (without exhibits).

83. At the emergency hearing, Fannie Mae admitted, via counsel, that the sole economic loss they would incur as a result of a stay pending appeal would be the cost of relisting the foreclosure sale, which is approximately $2,500. See, Exhibit S, Transcript of Oral Argument of the April 22, 2011 Hearing, at 21, ln. 2.

84. Significantly, during the hearing, the Court made several indications that it would remand the case back to the Bankruptcy Court for an Evidentiary Hearing. Id. at 10, ln. 9-12 ("What is the relief you seek, a remand back to the judge so he could conduct the Evidentiary Hearing? That determination should probably be made...by the bankruptcy court."); Id. at 27, ln. 6-11 ("I would like to explore whether...the hearing should have been conducted before the [bankruptcy] judge made a determination as to the viability of the plan."); Id. at 31, ln. 20-21 ("Fannie Mae should address whether a remand would be [the] appropriate course of action.").

85. After hearing argument, the Court entered an order providing that the Debtor's application as it pertained to an emergency TRO would be granted if it posted a bond in the amount

of $100,000 by April 27, 2011 at noon[4]. See, Exhibit T, April 22, 2011 Minute Order and Signed Order to Show Cause.

86. On April 27, 2011, the Court entered an order staying the foreclosure sale after the Debtor posted this required $100,000 bond. See, Exhibit U, April 27, 2011 Order.

87. Significantly, the Debtor's payment of this $100,000 bond on such short notice demonstrates its ability to procure significant funds, as it asserted it could do in its Chapter 11 Restructuring Plan[5].

88. Ultimately, the Court denied the stay application and vacated the stay based solely on the fact that the Debtor did not comply with Federal Rule of Bankruptcy Procedure 8005, since it did not first make the application to the Bankruptcy Court. As set forth above, this has been cured. However, the Court did not rule, or even comment on the merits of the stay application, including the Debtor's likelihood of success on the merits. The Debtor respectfully submits that this, along with the Court's clear indication at the April 22, 2011 Hearing that it would remand the case to the Bankruptcy Court for an Evidentiary Hearing, demonstrates that the Debtor will succeed on the merits of its appeal. See, Exhibit V, June 8, 2011 Minute Order and Memorandum & Order.

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[4] As the Court may recall, the reason it ordered the bond in this exorbitant amount was not because of any monetary harm Fannie Mae would incur as a result of the delay of the foreclosure sale, but based purely on Fannie Mae's assertion that there was a risk that the property would be lost to the government due to forfeiture during the pendency of the stay. Fannie Mae's lawyers represented that there was illegal drug activity at the property, which might lead to such forfeiture. However, no such forfeiture occurred during the stay.

[5] Notably, Mr. Hoffman, who is an Orthodox Jew, was able to obtain the bond even though he only had a total of approximately five business hours to do so. At approximately 3:00 p.m. on Friday, April 22, 2011, the District Court ordered that the Debtor post the $100,000 bond by noon on Wednesday, April 27, 2011. Mr. Hoffman was unable to conduct any business on April 25 or 26, due to those days being the last two days of Passover. Nevertheless, he obtained and timely posted the bond (after a short extension obtained upon the Debtor's application).

XIV

The Events Subsequent to the Bankruptcy Court's Orders Highlight the Bankruptcy Court's Error in Not Conducting An Evidentiary Hearing and Making Its Rulings Based Solely on the Pleadings

89. As set forth above, in mid-April, the Debtor was able to procure a tenant for the remaining vacant commercial space for $1,350 per month. See, ¶¶ 75-80, *supra*. This substantiates the Debtor's contention that it needed until the springtime to obtain a tenant, since the real estate market picks up during that period.

90. In addition, the Debtor obtained the required $100,000 bond for the stay pending appeal on extremely short notice. See, ¶¶ 85-87, *supra*. This proves the veracity of the Debtor's assertions that it was able to obtain the $140,000 cash infusion provided in the Chapter 11 Plan.

91. These facts, which occurred subsequent to the Bankruptcy Court's Orders highlight the fact that an Evidentiary Hearing was necessary, and that the Bankruptcy Court erred in not conducting one.

XV

Fannie Mae Schedules a Foreclosure Sale of the Property for July 21, 2011

92. On or around June 23, 2011, Fannie Mae filed in the State Court Foreclosure Proceeding a Notice of Sale of the Property, scheduling the sale of the Property for July 21, 2011, at 3:00 p.m. Exhibit W.

XVI

The Appeal Has Been Fully Briefed

93. Meanwhile, the appeal has been fully briefed since June 17, 2011 and the parties are awaiting a decision on the appeal.

94. Thus, any stay imposed by the Court pending appeal would most likely be for a short period of time, causing no prejudice to Fannie Mae, with only minimal pecuniary losses.

XVII

The Appellant Has Cured the 8005 Deficiency, and Applied to the Bankruptcy Court for a Stay Pending Appeal, Which the Bankruptcy Court Summarily Denied Without Granting the Appellant a Hearing

95. By July 15, 2011, the Court had still not rendered a decision on the appeals. The Appellant was hoping that the Court would have rendered a decision by that time, since success on appeal would have vitiated the pending foreclosure sale, and further costly stay applications. However, by that time, the Appellant had no choice but to file an emergency application with the Bankruptcy Court for a stay pending appeal. Exhibit X (application without exhibits). Fannie Mae filed a brief reply (Exhibit Y, reply without exhibits), to which Appellant responded (Exhibit Z, response without exhibits).

96. The Appellant filed the emergency application on July 15, 2011, at 11:22 a.m. See, ECF Filing Receipt, part of Exhibit X. Within four hours, at 3:07 p.m., the Bankruptcy Court summarily denied the emergency application. Notably, the Bankruptcy Court did not conduct a hearing, nor did it articulate the reasons for its denial. The Bankruptcy Court simply stated that "all

four" of the factors under 8005 had not been met. The Bankruptcy Court also stated, without even conducting a hearing that the Debtor "self-created" an emergency situation and put itself in this position. See, Exhibit AA, Bankruptcy Court's July 15 Minute Entry and Order.

97. However, as set forth above, there would not have been a need for the emergency motion had the Court adjudicated the appeals, which had been fully briefed since June 17, 2011.

ARGUMENT

I

THE BANKRUPTCY COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S EMERGENCY STAY APPLICATION

98. The Bankruptcy Court's denial of the Appellant's emergency stay application is reviewed for abuse of discretion. In re Lang, 414 F.3d 1191, 1201-1202 (10th Cir. 2005). In denying the Appellant's emergency application, as set forth herein, the Bankruptcy Court abused its discretion in a number of ways. Furthermore, the Appellant respectfully submits that the Bankruptcy Court's failure to articulate any reasons for its conclusions merits de novo review in this situation[6]. In any event, the Appellant demonstrates herein that the Bankruptcy Court's denial of the stay application should be overturned on either standard of review.

[6]The Bankruptcy Court's failure to allow, let alone provide, a record for its reasons for denying the emergency application stay, prevents the District Court from performing a review for abuse of discretion. This is because, inherent in Rule 8005 is the requirement that the movant provide the District Court with a record of the Bankruptcy Court's actions in denying a stay pending appeal, which allows for the District Court to determine whether the denial was an abuse of the discretion (See, In re Ohanian, 338 B.R. 839, 846 E.D. Cal. 2006). As no such record is available, the Appellant respectfully submits that the Court should determine the instant application de novo.

99. Firstly, the Bankruptcy Court abused its discretion when it did not articulate any reason behind its conclusory statements that the Appellant "failed to satisfy all four required elements" for a stay pending appeal.

100. It was clear error, as a matter of law, that the Bankruptcy Court ruled that "all four" elements must be met. In point of fact, the Second Circuit has never articulated such a rigid rule of law. To the contrary, "the Second Circuit has consistently treated the inquiry of whether to grant a stay pending appeal as a balancing of factors that must be weighed." ACC Bondholders Grp. v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.), 361 B.R. 337, 347 (S.D.N.Y. 2007).

101. Not only did the Bankruptcy Court not articulate which factors were met, and which not, it also abused its discretion by requiring "all four" factors to be met, when no such rigid rule of law has been established in the Second Circuit.

102. Secondly, as set forth extensively below, the Appellant clearly met all four factors in favor of granting the stay, and the Bankruptcy Court abused its discretion in ruling otherwise. Thus, in any event, the Bankruptcy Court erred when ruling that the Appellant did not meet all four relevant factors.

103. Furthermore, the Bankruptcy Court erred in characterizing the situation as a "self-created" emergency, which seems to be an artificial factor created by the Bankruptcy Court. Although this Court's denial of the Appellant's first application was made on June 8, 2011, Fannie Mae did not file a notice of foreclosure sale until on or around June 23, 2011. Meanwhile, the appeal had been fully briefed since June 17, 2011, and the Appellant was awaiting a favorable decision from the Court which would vitiate the foreclosure sale and the need for further stay applications.

104. Significantly, as the Appellant set forth to this Court in its first stay application, a stay application to the Bankruptcy Court is futile (as proven by the Bankruptcy Court's summary denial), and the Appellant was hoping to avoid the time and expense of making the futile motion, and then, the instant application.

105. Accordingly, the Bankruptcy Court abused its discretion in denying the Appellant's stay application, and this Court should grant the stay pending appeal.

II

THE APPELLANT HAS MET ALL FACTORS FOR THE COURT TO STAY THE LIFT STAY ORDER, DISMISSAL ORDER AND THE FORECLOSURE SALE OF THE PROPERTY, PENDING THE APPEAL, PURSUANT TO FRBP 8005

A. The Standard to Grant a Stay under FRBP 8005

106. Rule 8005 of the Federal Rules of Bankruptcy Procedure provides, in pertinent part:

> A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance.

Fed. R. Bank. Pro. 8005

107. In this case, the Appellant requests a stay of the Lift Stay Order, the Dismissal Order, and the foreclosure sale.

108. In order to determine whether stay pending appeal is appropriate, the court examines (1) the likelihood of success on the merits, (2) whether the movant will suffer irreparable harm if the stay is denied, (3) whether granting the stay will cause substantial harm to the other parties, and

(4) whether the relief requested is contrary to the public interest. In re Martin, 199 B.R. 175 (Bankr. E.D. Ark. 1996, aff'd, 116 F.3d 480 (8th Cir. 1997).

109. In this case, all the above factors weigh in favor of granting the stay.

B. The Appellant is Likely to Succeed on the Merits of its Appeals[7]

(i) The Appellant Will Succeed on the Merits of its Appeal of the Lift Stay Order

110. The Appellant will succeed on the merits of its appeal of the Lift Stay Order for a number of reasons, which all reflect that the Bankruptcy Court abused its discretion in entering the Lift Stay Order. In re Chunn, 106 F.3d 1239, 1242 (5th Cir. 1997) (Bankruptcy Court's lifting of the automatic stay is reviewed for abuse of discretion.)

1. The Bankruptcy Court Abused its Discretion in Finding "Cause" to Lift the Automatic Stay Based on Technical Deficiencies which had no Bearing as to Whether the Appellant had the Ability, or Intention, of Reorganizing.

111. In the first instance, the Bankruptcy Court abused its discretion by finding "cause" based on technical deficiencies which had no bearing on the Appellant's ability, or intention, to reorganize. Although the Bankruptcy Court did not enumerate, at the conclusion of the March 8, 2011 Hearing, the exact factors constituting "cause," a review of the transcript, and of the "cause" it found in dismissing the case, evidences that the "cause" to lift the stay consisted of the following purely procedural factors.

a. The fact that the Appellant did not furnish its tax returns to the U.S. Trustee;

[7] In addition to the arguments set forth herein, the Appellant also incorporates by reference the arguments set forth in its Brief's filed in connection with the appeals in Civil Case Nos. 11-cv-2201(KAM), and 11-cv-2202(KAM) to the extent not specifically set forth herein.

b. The fact that the Appellant did not yet supply the U.S. Trustee, or amend its schedules, to reflect payments made within 90 days of the Petition Date and the payments made by the Appellant for Mr. Hoffman's car.

112. Notably, none of these factors were relevant to the question of whether the Appellant had the ability to reorganize.

113. In any event, the Bankruptcy Court abused its discretion in finding "cause" based on these facts.

114. Firstly, the Appellant, a single member LLC, was never required to file tax returns. As set forth in Section 301.7701-3(b)(1)(ii) of the Tax Code, a single member LLC which does not elect to be treated as a corporation by the filing of Form 8832 (such as the Appellant), is treated as a sole proprietor, and, thus, the tax attributes of the business are reported directly via Schedule C of the individual member's Form 1040. Thus, basing the lifting of the stay, in part, on the Appellant's failure to supply the U.S. Trustee with its tax returns, is an abuse of discretion.

115. The second technicality, i.e., not supplying the list of payments made within 90 days of the Petition Date, and information concerning the payments made for Mr. Hoffman's car, is also not a reason meriting the lifting of the stay. In point of fact, Fannie Mae did not raise this issue in its moving papers, but only raised it in its Reply, when it was faced with challenging the Appellant's Plan and Disclosure Statement. For the Bankruptcy Court to use this as a basis to lift the stay is an abuse of discretion.

116. Indeed, these technicalities cannot be "cause" to lift the stay under 11 U.S.C. § 362(d), since, as with "cause" under 11 U.S.C. § 1112(b), the "cause" necessary to lift the automatic stay would have to be a showing of bad faith evidencing "that an attempt at reorganization would

be futile." In re Trina Assoc., 128 B.R. 858, 872 (Bkrtcy. E.D.N.Y. 1991). Thus, any basis for "cause" must necessarily demonstrate the futility of the Chapter 11 Proceeding. The hyper-technical issues used as the bases for "cause" have no bearing on the Appellant's ability to reorganize.

117. Accordingly, the Bankruptcy Court abused its discretion when using these as bases to find "cause."

2. The Bankruptcy Court Abused its Discretion in Finding, Based on the Pleadings Before it, that an Effective Reorganization was not Possible.

118. Aside from basing its decision to lift the stay for "cause," the Bankruptcy Court specifically entered the Lift Stay Order based on the fact that, at that point, the Bankruptcy Court did not think that an effective reorganization was possible[8].

119. However, the Bankruptcy Court clearly abused its discretion when ruling, based solely on the pleadings, that the Appellant had no possibility for an effective reorganization.

120. In that regard, the Bankruptcy Court was mandated, at the very least, to hold an Evidentiary Hearing concerning the allegations contained in both Fannie Mae's, the Appellant's, and Binghamton's pleadings.

121. While the Bankruptcy Court may have had its doubts as to the Appellant's contentions that it had the ability to reorganize, and, in particular, to obtain the $140,000 cash infusion and rent the remaining vacant commercial unit, it was clear error for the Bankruptcy Court

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[8]Although the Bankruptcy Court also stated, in connection with granting the Fannie Mae Motion that there was no equity in the Property, the Appellant had conceded that point. However, despite not having any equity in the Property, the Bankruptcy Court was still not able to lift the stay if the Property is necessary for an effective reorganization, which, as demonstrated herein, and to the Bankruptcy Court below, it was. 11 U.S.C. § 362(d)(2).

to find, without an Evidentiary Hearing, that the Appellant would not succeed at its reorganization efforts. This is because, for the purposes of determining whether the Bankruptcy Court should have held an Evidentiary Hearing, it first had to determine whether the Appellant had the ability to reorganize based on the representations made in the Appellant's and Binghamton's pleadings, and by the Appellant's and Binghamton's counsel in open court. Significantly, in making its determination at the March 8, 2010 Hearing, the Bankruptcy Court had to take the Appellant's and Binghamton's offers of proof as true.

122. In that regard, 11 U.S.C. § 362(d) provides that determination of motion for relief from the automatic stay must be made "after notice and a hearing." 11 U.S.C. § 362(d). The phrase "after notice and a hearing" means "after such notice that is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate under the particular circumstances." 11 U.S.C. § 102(1)(A). Thus, the question of whether the Bankruptcy Court was required to conduct an Evidentiary Hearing, as opposed to ruling based on the pleadings and counsels' oral arguments, depends on the nature of what is being offered via the pleadings and by counsel. If the pleadings, and counsels' representations, taken as true, still did not defeat Fannie Mae's Motion, then an Evidentiary Hearing was not required. However, the Bankruptcy Court is not authorized, on its own, to resolve conflicts in the pleadings without conducting an Evidentiary Hearing. See, In re Drislor Associates, 110 B.R. 937, 940 (D. Colo. 1990). ("The opportunity for the parties to be heard is also 'appropriate in the particular circumstances,' so long as the court is assuming the truth of what is offered and not attempting to resolve issues on conflicting offers of proof.")

123. In this case, the Appellant's and Binghamton's pleadings and representations by counsel, i.e., their offers of proof, if taken as true - which the Bankruptcy Court must do - all evidence that the Appellant, in fact, had the ability to reorganize, via, *inter alia*, the $140,000 cash infusion and the renting of the vacant commercial unit and the monthly payments made to Fannie Mae, as provided in the Amended Plan. The Bankruptcy Court, however, abused its discretion and ruled on these factual issues without an Evidentiary Hearing[9].

124. Moreover, there was no reason for the Court to grant Fannie Mae's request for relief, given that the Debtor adequately protected Fannie Mae, and, thus, there would have been no prejudice to the continuation of the automatic stay.

125. Accordingly, the Court abused its discretion in finding that the Debtor had no possibility of reorganizing[10].

(ii) The Appellant Will Succeed on the Merits of its Appeal of the Dismissal Order

126. As with the ruling concerning the Lift Stay Order, the Bankruptcy Court, similarly, abused its discretion in entering the Dismissal Order. In re Crysen/Montenay Energy Co., 166 B.R.

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[9]Indeed, based on the pleadings, the Appellant clearly met its burden of establishing that the Property is **essential to an effective reorganization that is in prospect.** United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988) (emphasis added).

[10]In this regard, Fannie Mae cannot argue that the Bankruptcy Court's determination was a "finding of fact" - which is subject to review of clear error - since the Bankruptcy Court should never have made that determination without an Evidentiary Hearing. Thus, as the Bankruptcy Court's determination was an erroneous ruling of law, it is subject to de novo review, which, as set forth herein, will be reversed since the Bankruptcy Court erred, as a matter of law, by not conducting an Evidentiary Hearing.

In any event, if the Bankruptcy Court's ruling is considered a finding of fact, it must still be reversed based on clear error. This is because there is no rational explanation as to why the Bankruptcy Court refused to credit the representations in the Appellant's and Binghamton's pleadings, over Fannie Mae's.

546, 549 (S.D.N.Y. 1994) (The standard of review of a Court's dismissal of a case is abuse of discretion.)

127. Here, as with the Lift Stay Order, the Bankruptcy Court based its findings on a clearly erroneous view of the law, i.e., the standard applicable to a dismissal of a Chapter 11 Case. See, Sears Roebuck, and Co. v. Spivey, 265 B.R. 357, 364 (E.D.N.Y. 2001) (A Court abuses its discretion when it bases its decision on an erroneous view of the law or clearly erroneous factual findings.)

128. As with the Lift Stay Order, the technical deficiencies raised by the Bankruptcy Court have no relevance as to the Appellant's ability to reorganize, or whether it filed its Bankruptcy Petition with the intention of reorganizing.

129. Furthermore, the Bankruptcy Court had no authority to determine, without an Evidentiary Hearing, and based only on its feelings that the Appellant's Amended Chapter 11 Plan was "suspect" (See, Exhibit J, at 50), to determine that the Appellant had no possibility, let alone a reasonable possibility, of reorganizing.

130. Accordingly, the Bankruptcy Court abused its discretion in finding "cause" for dismissal in the absence of an Evidentiary Hearing, when the Appellant's and Binghamton's offers of proof, i.e., their pleadings and representations by counsel in open court, evidenced the ability to confirm a Chapter 11 Plan, and that the Chapter 11 Case was not a bad faith filing.

131. In addition, as with the Lift Stay Order, the Bankruptcy Court had no logical reason to dismiss the case, which would benefit Fannie Mae, to the detriment of the other creditors, when Fannie Mae, whom the Appellant adequately protected, would suffer no prejudice by the continuation of the Bankruptcy Proceeding to confirmation.

(iii) In Addition, the Court Indicated it Would Reverse and Remand the Case for An Evidentiary Hearing

132. The Court indicated several times, at the April 22, 2011 Hearing, that it would remand the case back to the Bankruptcy Court for an Evidentiary Hearing. See, ¶ 84, *supra*. Thus, Appellant respectfully submits that it will succeed on appeal.

C. The Appellant Will be Irreparably Injured in the Absence of a Stay

133. The fact that the Appellant will be irreparably harmed in the absence of a stay cannot be disputed. In that regard, the foreclosure sale of the Property would render the appeals of the Bankruptcy Court's Orders moot, leaving the Appellant without an adequate remedy at law. See, Markstein v. Massey Associates, Ltd., 763 F.2d 1325, 1327. (In the absence of a stay pending appeal of an order lifting the stay, the foreclosure sale of the property renders the court powerless to rescind the sale on appeal.)

D. No Party Would be Injured by the Granting of the Stay, Since the Appellant has the Ability, and is Ready, Willing, and Able, to Adequately Protect Fannie Mae, as it had Done During the Bankruptcy Proceeding, and Fannie Mae, Admittedly, Will Incur No Expenses During the Stay

134. Furthermore, Fannie Mae would not be harmed by a stay, as the Appellant has the ability to adequately protect Fannie Mae during the pendency of the appeals.

135. Indeed, as it had done throughout the Bankruptcy Proceeding, the Appellant is ready, willing, and able to make monthly adequate protection payments to Fannie Mae during the pendency of a stay pending appeal.

136. Additionally, the only financial loss Fannie Mae will incur is the $2,500 expense to relist the foreclosure sale. Thus, Fannie Mae would suffer only minimal pecuniary loss as a result of the stay.

E. Granting of the Stay Serves the Public Interest

137. The public interest mandates granting the Stay. This is because the public has an interest in debtors paying all their creditors, not just the secured creditor.

138. In that regard, as set forth in the Appellant's Plan, Binghamton would receive payments upon confirmation. However, it would receive nothing through a foreclosure sale, where all the proceeds would go only to Fannie Mae, as their mortgage lien is greater than the value of the Property.

139. Thus, the final factor also merits granting the stay.

140. The above demonstrates that the Appellant is entitled to a stay if this Court determines this application de novo.

141. In addition, the above, which sets forth the argument presented to the Bankruptcy, clearly demonstrates that the Bankruptcy Court abused its discretion when determining that the Appellant did not meet all four elements for a stay pending appeal.

III

THE COURT SHOULD GRANT TEMPORARY RESTRAINTS STAYING THE LIFT STAY ORDER, DISMISSAL ORDER, AND ENJOINING FANNIE MAE FROM CONDUCTING THE FORECLOSURE SALE OF THE PROPERTY, PENDING THE HEARING AND DETERMINATION OF THIS EMERGENCY APPLICATION

142. The Court should also grant Appellant's request for temporary restraints staying the Bankruptcy Court's Orders and enjoin Fannie Mae from conducting the foreclosure sale of the Property, pending the hearing and determination of this emergency application.

143. The Appellant has demonstrated that it is entitled to a stay pending appeal, and thus, it is also entitled to the temporary restraints. Gund, Inc. v. SKM Enterprises, Inc., No. 01 Civ 0882(CSH), 2001 WL 125366, at *1 (S.D.N.Y. Feb. 14, 2001). ("The standard for granting a temporary restraining order and a preliminary injunction are the same.")

144. In particular, the Appellant needs the temporary restraints to avoid losing its Property to a foreclosure sale currently scheduled for July 21, 2011, at 3:00 p.m., which would render its appeals of the Bankruptcy Court's Orders moot.

145. As set forth above, the reason the Appellant waited until July 15, 2011 to make its emergency application to the Bankruptcy Court to cure the FRBP 8005 deficiency in its initial emergency application to the Court was because it was hoping for a favorable decision on the appeals prior to the foreclosure sale, which would vitiate the need for further stay applications.

146. Accordingly, the Court should grant Appellant's request for temporary restraints.

Memorandum of Law

147. This Emergency Application includes citations to the applicable authorities and does not raise any novel issues of law. Accordingly, the Appellant respectfully requests that the Court waive the requirement contained in Rule 7.1(a) of the Local Rules of the Southern and Eastern Districts of New York that a separate memorandum of law be submitted.

Good and Sufficient Reason to Proceed by Order to Show Cause Rather Than Notice of Motion

148. Pursuant to Rule 6.1(d) of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, the Appellant must proceed by Order to Show Cause, since it is also requesting immediate temporary restraints, pending the hearing and determination of this emergency application, for a stay of the Lift Stay Order, Dismissal Order, and foreclosure sale of the Property. As set forth above, the Appellant will be irreparably harmed should the foreclosure sale, currently scheduled for July 21, 2011, at 3:00 p.m. go forward, and an immediate stay is necessary to prevent such irreparable harm.

Prior Notification to Fannie Mae

149. On July 18, 2011, at approximately 12:00 p.m. the Appellant's counsel informed Fannie Mae's counsel, by e-mail, of the Appellant's intention to file this order to show cause with temporary restraints before the Court.

150. Furthermore, The Appellant's counsel e-mailed to Fannie Mae's counsel a copy of this declaration, proposed order to show cause, and Exhibits, at approximately 12:20 p.m., on July 18, 2011.

151. In addition, Fannie Mae received notice of the filing of this Application through ECF.

Prior Request for Relief

152. As set forth above, the Appellant made a prior application on April 22, 2011 to this Court for the relief requested. As also set forth above, this Court denied the application. Furthermore, as also set forth above, the Appellant subsequently made the instant application to the Bankruptcy Court on July 15, 2011, which the Bankruptcy Court summarily denied.

153. Aside from the above, no other prior requests for the relief sought herein have been made.

CONCLUSION

154. For the forgoing reasons, the Court should grant the Appellant's emergency application and enter an Order:

> (a) staying the Lift Stay Order and Dismissal Order, and foreclosure sale of the Property pending the hearing and determination of the appeal; and
> (b) for such other further relief as this Court may deem just and proper,
> and for temporary restraints staying the enforcement of the Lift Stay Order and Dismissal Order, and the foreclosure sale of the Property, pending the hearing and determination of this emergency application.

I, David Carlebach, hereby declare pursuant to 28 U.S.C. § 1746 under penalty of perjury that the foregoing is true and correct based on personal knowledge, and a review of my files, records, and the pleadings concerning the Chapter 11 Proceeding and the Debtor's Prior Application and Appeal to the District Court.

Executed at New York, New York on this 18th day of July, 2011

s/David Carlebach (DC-7350)
DAVID CARLEBACH (DC-7350)